



2002717

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

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DENVER, CO 80202-2466

Phone 800-227-8917

<http://www.epa.gov/region08>

Ref: 8ENF-L

OCT 18 2002

VIA FACSIMILE (817-352-3468)

Pamela Nehring, Senior General Attorney  
Burlington Northern Santa Fe Railway  
2500 Lou Menk Drive  
Fort Worth, TX 76131-2828

Re: Libby Asbestos Superfund Site - Administrative  
Order on Consent - Draft Redline Pages

Dear Pam:

Enclosed are several pages showing changes from the draft I sent to you on August 17, 2002. These pages should show all of the changes that we agreed to in our conference call yesterday. In addition, there were several suggested changes that I indicated I needed to contemplate and/or speak with others about. I have still not spoken with Duc Nguyen about the stipulated penalties issue, so that is unchanged. I have spoken with others concerning several of your suggested inserts or changes and we have the following comments. Starting with your first suggested insert. You will see that I have inserted most of the language from this insert into paragraph 4 of the Order. I have attempted to redraft the last sentence of this first insert to reflect what I understood to be your intent.

The next part of the Order that I needed to discuss with others concerned the additions and inclusions to the Findings of Fact. In paragraph 10, you requested the addition of handwritten language concerning the source of the vermiculate on your property. We think it is more accurate to state that the source of the vermiculite was the Grace mine, so we have rewritten the first part of your suggested addition to reflect that fact. We have omitted the second part of your suggested language, because we think that there may have been activities by parties other than Grace that caused the vermiculate to be found on your property. You will also see that I added to paragraph 10 a sentence dealing with the divisibility of harm issue. This was my attempt to simplify what you had written in one of your suggested inserts. I also deleted the language on the NPL issue after several people commented that it was not relevant to this Order and should be omitted. The specific language on divisibility that I have included has not been reviewed by others at EPA, but inclusion of the concept has been okayed by my reviewers, so I included the language for you to consider while we look at it here.

The next issue concerns the insert you suggested for paragraph 78, now paragraph 77, of the Order. We have removed the last sentence of your insert. We were unclear what this sentence would preserve and we are unsure what unintended consequences could arise from this



sentence. Our analysis is that this sentence is not needed. The first two sentences of your insert make it very clear that if EPA wants BNSF to do work off-site, then we can't require you to do that work pursuant to this Order. If the parties disagree about what is off-site, then that dispute would be handled under the dispute resolution provisions of this Order. Under the dispute resolution provisions, each party has the chance to develop the record through their statements of positions.

Finally, concerning paragraph 79, now 78. After I inserted your suggested language, it didn't seem to make sense, so I think we need to discuss this issue further.

Please give me a call, at your earliest convenience and we can discuss this redraft. My direct line is (303) 312- 6638.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard L. Sisk". The signature is fluid and cursive, with the first name "Richard" being more prominent and the last name "Sisk" following in a similar style.

Richard L. Sisk  
Attorney

Enclosures

cc: Leo Barry (Fax # 406-443-6883)

## **I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and The Burlington Northern and Santa Fe Railway Company ("Respondent"). This Order provides for the performance of a removal action by Respondent and the reimbursement of certain response costs incurred by the United States at or in connection with the Respondent's property comprising the Libby rail yard in Libby, Montana (the "Property").

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended ("CERCLA").

3. EPA has notified the State of Montana (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondent recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Order do not constitute an admission of any liability. { Respondent has raised defenses to the assertions of liability, which are being considered by EPA. Nevertheless, Respondent is agreeing to proceed with the Work under this Order due to weather constraints with respect to the timing of the Work and in consideration of EPA's acknowledgment that the Work conducted pursuant to this Order and Future Response Costs reimbursed pursuant to this Order may be used as consideration, in whole or in part, towards a future de minimis or other settlement of Respondent's potential liability for the Libby Asbestos site generally. } Respondent does not admit, and retains the right to {assert any defenses and }controvert in any subsequent proceedings{, } other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Respondent agrees to comply with and be bound by the terms of this Order and further agrees that it will not contest the basis or validity of this Order or its terms.

## **II. PARTIES BOUND**

5. This Order applies to and is binding upon EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Order.

6. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

i. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

j. "Order" shall mean this Administrative Order on Consent and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Order and any appendix, this Order shall control.

k. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.

l. "Parties" shall mean EPA and Respondent.

m. "Property" shall mean ~~the~~ The Burlington Northern and Santa Fe Railway Company rail yard located in Libby, Montana and more particularly described in Appendix\_\_.

n. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

o. "Respondent" shall mean The Burlington Northern and Santa Fe Railway Company{ and its predecessors}.

p. "Section" shall mean a portion of this Order identified by a Roman numeral.

q. "Site" for purposes of this Order shall consist of the Property~~[and all suitable areas in very close proximity to the Site necessary for implementation of the removal action]~~.

r. "State" shall mean the State of Montana.

s. "Waste Material" shall mean 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and 4) any "hazardous material" under [insert appropriate State statutory citation].

t. "Work" shall mean all activities Respondent is required to perform under this Order, as set forth in the Workplan.

u. "Workplan" shall mean the work plan for implementation of the removal action, as set forth in Appendix \_\_ to this Order, and any modifications made thereto in accordance with this Order.

#### **IV. FINDINGS OF FACT**

8. The Site, i.e., ~~{the}~~ The Burlington Northern and Santa Fe Railway Company ~~{rail yard}~~ {railyard}, is located north of the town of Libby, MT and south of the Kootenai River. The Site encompasses approximately 20 acres and is located in Section 7, Township 30 N, Range 31 W of Lincoln County. A total of six railroad tracks trending east-west are present along with associated buildings and siding platforms.

9. Vermiculite mining at Zonolite Mountain (the "mine") was commenced by the Universal Zonolite Company in the 1920s. In 1963, W.R. Grace purchased Zonolite mountain and continued operations until 1990. The processed ore was trucked down the Rainy Creek Road to a Screening Plant, which separated the milled ore into various sizes. Subsequently, the screened ore was moved by conveyor belt across the Kootenai River {to a loading facility owned and operated by W.R. Grace, where it was loaded by W.R. Grace employees into rail cars } and shipped either to the { W.R. Grace } Export/Expansion Plant (Libby) or across the country by rail.

10. Sampling shows that asbestos, a hazardous substance, is present in soil, raw ore, ore-concentrate and other soil-like materials at various locations in and around the community of Libby including the Site. {The potential harm caused by the asbestos on the Site is divisible from the potential harm caused by asbestos off the Site. } Visible unexpanded vermiculite has been found along Respondent's tracks and rail ~~{yards}~~ {yard in Libby}. { All vermiculate found on the Property originated from W.R. Grace's mine on Zonolite mountain }

11. The Acting Assistant Administrator, Office of Solid Waste and Emergency Response has determined that the presence of the asbestos at the Site may present an imminent and substantial endangerment in the Action Memorandum.

12. Respondent owns ~~{the}~~ The Burlington Northern and Santa Fe Railway Company rail yard, herein referred to as the Property. Respondent recently implemented its own investigations ~~{to determine if yard activities would entrain asbestos fibers into the air. Baseline monitoring along the tracks conducted by Respondent has found the highest concentrations measured during the sweeping ranges from 7 to 14 f/cc in air samples in three locations - Hwy. 37 crossing the railroad tracks, close to the 5<sup>th</sup> Street, and the loading/unloading station near the Bluffs}~~ {regarding asbestos}. A total of twenty-two surface soil samples collected in November, 2001 by Respondent along the railroad tracks and its railyard ranged from trace to less than 1% fibrous amphibole asbestos by weight. In addition, visible unexpanded vermiculite remained at Track #1, Track #2 and Track #3. ~~{ }~~

## **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

13. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. The Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes a "hazardous substance" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is ~~jointly and severally~~ liable for performance of response ~~{actions}~~ {actions} and for response costs incurred and to be incurred at the Site.

i. Respondent is the "owner" and/or "operator" of a portion of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

ii. Respondent was the "owner" and/or "operator" of a portion of the facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from a facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The removal action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## **VI. ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered ~~[and Agreed]~~ that Respondent shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order. { The Respondent agrees to comply with all provisions of this Order. }

## **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR**

14. Respondent shall perform the removal action or retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s)

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

### **IX. SITE ACCESS**

23. If property where access is needed to implement this Order, is owned or controlled by Respondent, Respondent shall, commencing on the Effective Date, provide EPA, the State, and their authorized representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order. Any such access will be subject to Respondent's Health and Safety Plan and Respondent's railroad safety rules.

~~[ 24. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements within 10 days after the Effective Date, or as otherwise specified in writing by the OSC. Respondent shall immediately notify EPA if after using its best efforts they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing its efforts to obtain access. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).~~

} 2{5}{4}. Notwithstanding any provision of this Order, EPA and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

### **X. ACCESS TO INFORMATION**

2{6}{5}. Respondent shall provide to EPA, upon reasonable request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

## **XXVI. MODIFICATIONS**

7{5}{4}. The OSC may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

7{6}{5}. If Respondent seeks permission to deviate from any approved work plan or schedule, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph {756}{74}.

7{7}{6}. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

## **XXVII. ADDITIONAL REMOVAL ACTION**

7{8}{7}. If EPA determines that additional removal actions{ on the Site} not included in an approved plan are necessary to protect public health, welfare, or the environment, EPA will notify Respondent of that determination. Unless otherwise stated by EPA, within 30 days of receipt of notice from EPA that additional removal actions are necessary to protect public health, welfare, or the environment, Respondent shall submit for approval by EPA a work plan for the additional removal actions. The plan shall conform to the applicable requirements of Section VIII (Work to Be Performed) of this Order. Upon EPA's approval of the plan pursuant to Section VIII, Respondent shall implement the plan for additional removal actions in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the OSC's authority to make oral modifications to any plan or schedule pursuant to Section XXVII (Modifications). {The} {foregoing notwithstanding, nothing in this Order shall require Respondent to take any action, conduct any investigation, or conduct any removal or remediation activities off-Site. In the event that EPA determines that additional removal actions are necessary off-Site, such additional removal actions shall not be subject to this Order.}

## **XXVIII. NOTICE OF COMPLETION OF WORK**

7{9}{8}. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including, post-removal site controls, if necessary, payment of Future Response Costs, or record retention, EPA will provide written notice to Respondent{ not later than 60 days from such determination}. {??????} If EPA determines that any such Work



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